

REMARKS

Claim 17 has been rejected under 35 U.S.C. 103(a) as being unpatentable over Opfel (US 2003/0192485) in view of Jones (U.S. Patent No. 5,030,086) alleging that it would be obvious to “...employ the burner of Jones **in the method of Opfel**, as the burner of Jones has been demonstrated to be effective in the sterilization of particulate matter.” (Emphasis added.)

In advisory action, it is stated: “...*the only difference between the Opfel reference and the instant claim 17 is the mobility of the apparatus. Since Jones evidences the known use of a mobile apparatus, it is certainly not deemed inventive to apply mobility to the known apparatus.*”

This rejection is respectfully traversed.

Applicant has extensively amended claim 17 to make it even clearer that it is patentable over the proposed combination of Opfel and Jones, including the recitation of specific structure used in the method.

Applicant clearly has an invention under 35 U.S.C. §101. The test under 35 U.S.C. §103(a) is obviousness. Clearly it would not be obvious to one of ordinary skill in the poultry business at the time that this invention was made from Opfel and Jones to move this claimed structure: “*a flamer having at least one burner situated under a hood, said burner pointing primarily more downwardly than horizontally to cause the flame to extend more downwardly than horizontally from the burner, the hood being disposed completely over the top of a flame from the flamer; a hitch for attaching said flamer to a prime mover; [claim 17] and skids operatively affixed to the hood and operatively engaged to the surface to be sterilized*” [claim 22] *in the method of sterilizing poultry*

litter recited in AMENDED claims 17 and 22. The Opfel hood is fixed *in situ*, so it would not be obvious to move the hood around. Nothing shown in Jones is a hood.

The USPTO's Advisory action says that "While Applicant asserts that Jones does not teach sterilization, the examiner maintains that it does indeed. The destruction of microorganisms and other disease causing organisms is sterilization in the known sense of the term." But Jones ONLY teaches killing micro-organisms that are associated with PLANTS. While the Jones patent in Col. 3, lines 55-58, Col. 4, lines 30-33, and lines 65-68 and Col. 5 lines 1-4 discusses burning of "weed, insect, or micro-organism control" and "blight and diseases associated with fungi" and "spores" as it relates to plants does not discuss "sterilization" of anything, let alone anything relating to sterilization of a surface with animal or poultry litter thereon. It is a different art that relates to plants. The art of this invention relates to poultry. Big difference.

The prime mover in Jones cannot move slow enough to do Opfel's method, therefore the two references teach away from each other. And there is simply no way to get the big Jones prime mover and row crop burner under a hood that might be in a horse stall. That puts the driver of the prime mover in the Jones device under the Opfel hood with the flames as well for 5-60 minutes at a temperature of "approximately 5-60 minutes" [page 10, paragraph 0092].

Jones is primarily a weed burner for the purpose of enhancing the environment for row crops such as plants C shown in Figs. 1 and 6 of Jones. It is towed by a tractor outside in a row crop field and it was never contemplated to be used inside of a poultry confinement system. Jones is non-analogous art which would not be considered as relevant by one of ordinary art in this art. Jones teaches burning plants in a row crop, not *in situ* heating of a surface.

The flamer of Jones is supported on the ground, and the flames are directed to plants, and not to the ground at all. Therefore, the flamer of Jones does not sterilize the surface referred to in claim 17, so using this teaching in “Opfel’s method” results in an inoperative device.

Using the procedure set forth in U. S. Supreme Court Decision in KSR Int’l Co. v. Teleflex Inc., 550 U.S. , 127 S. Ct. 1727, 1742, 167 L. Ed. 2d 705 (2007), **we must first determine what “art” this is for the purposes of obviousness under 35 U.S.C. §103 (a).** It is respectfully submitted that **the art involved is sterilization of poultry houses**, which is typically done with chemicals and heat. One of ordinary skill in this art would know this. If the USPTO disagrees with who one of ordinary skill in the art is, then it is believed that an identification of such by the USPTO would be in order under KSR. Such **“one of ordinary skill in the art”** can be assumed to know about the Opfel published application since the title of the Opfel reference is “METHOD AND SYSTEMS FOR DISINFECTING ANIMAL BEDDING AND STALLS” and Opfel mentions using it for chickens and other poultry.

However, as the Office Action clearly states, the method of Opfel is performed *in situ*, either with the Opfel structure of Figs. 2-7 inside a horse stall or the like, or bringing bedding to the structures shown in Figs. 2-7 of Opfel. Claim 17 recites the limitation of moving the flamer over the surface, that surface being defined as a surface in a poultry confinement where the poultry defecate to create “litter”. As the Opfel apparatus is made to be stationary or to move the “bedding” (which is apparently being read as “poultry litter”) through the Opfel machine, there would be no motivation to move that apparatus over the claimed surface of the poultry litter. Furthermore since the rejection proposes using “the method of Opfel” and Opfel’s method does not include

“moving the flamer over the surface while heating the poultry litter” as recited in claim 17, the proposed combination of Opfel and Jones does not “read on” this language of claim 17.

Though not alleged in the 103 rejection, it would not have been obvious to one of ordinary skill in the art to move the stationary device of Opfel over the surface of the poultry litter in view of anything, let alone the row crop burner of Jones. Notice in Fig. 6 of Jones how the burners are pointed at the crop C in each ROW.

From Wikipedia, the free encyclopedia) “In situ” is a Latin phrase meaning *in the place*. Opfel’s methods are clearly used while the hood is stationary, i.e. *in situ*. If another method in Opfel’ it is the USPTO’s obligation to point it out specifically in the four corners of the Opfel reference to provide *prima facie* case of obviousness as alleged. This has not been done.

Opfel’s emphasis is primarily for horse stalls. He mentions chickens and poultry as an afterthought in one line of a 29 page small print document. Furthermore it would not be obvious to “one of ordinary skill in THE ART” (the art of sterilizing poultry houses) to put the Jones tractor and burner in a horse stall or poultry barn to move them around **“to employ the burner of Jones in the method of Opfel”** (Emphasis added). The only way the Jones burner moves is when it is towed by a tractor. So since we now have the Jones tractor and burner in an ANIMAL OR POULTRY CONFINEMENT ENVIRONMENT, (in the §103 rejection) are we supposed to use the moveable Jones burner or the Opfel *in situ* heating device in the “method of Opfel”? The Jones burner is towed, which is not *in situ*. **So does the Jones burner move or not in the proposed combination of Opfel and Jones?** If we use the Jones tractor and burner in an animal

or poultry confinement environment we must NOT MOVE the Jones tractor and burner after it is in the horse stall otherwise it would not be using “method of Opfel” *in situ*. Opfel states that “heating of the animal bedding with a flame may be carried out at a temperature of approximately 100° F to approximately 2,000° F for a time period of approximately 5-60 minutes.” (Opfel, paragraph [0092]. So how do you heat something for 5-60 minutes using the Opfel method while using a tractor to tow a burner around in a horse or poultry confinement building? Once the burner passes over the surface, the surface is no longer being heated. Opfel device *in situ* as it was designed to be used. The Opfel devices are not designed to be moved around. How slow does the Jones burner need to move to be over the surface of the litter for 5 to 60 minutes and can a tractor even move that slowly? This proposed combination of Opfel and Jones is a practical impossibility. The Jones burner was intended to be towed around in a row crop field, pointing the burners at the row crop. Clearly it would not be obvious to combine these two references, Opfel and Jones as alleged in the above identified rejection.

Opfel in paragraph [0051] states “Preparing a stall and/or animal bedding for disinfecting in step **102** may involve any number of steps and implementing components, and preparing a stall and soiled animal bedding may be accomplished readily by those with ordinary skill in the art from the disclosure herein. Preparing a stall and soiled animal bedding may be accomplished with the bedding in place (in situ) or removed from the stall depending on among other considerations the subsequent disinfecting method and or/system to be utilized.” (Emphasis added.) Clearly this teaching of putting the Opfel contraptions of Opfel’s Figs. 2, 3, 4, 5, 6 or 7 in a confinement building for horses or poultry, or moving the bedding from such confinement building and putting it into the contraptions of Opfel’s Figs. 2, 3, 4, 5, 6 or

7 are very different from amended claim 17 of the instant application. Using Jones's tractor and row crop burner does not fit into either one of Opfel's methods.

The Jones burners are pointed inwardly to burn strips or rows of plants. Jones has no hood. Opfel suggests also in paragraphs [0065] [0074] using an "airborne disinfecting medium" which could burn up or explode in contact with a direct flame. This teaches away from the proposed combination of Opfel and Jones. Opfel goes on and on about his "method" so it would be appreciated if the "Opfel method" referred to the in the above identified rejection would be defined in steps as related to the claim 17 language, pointing to the specific places in the 29 pages of the Opfel disclosure that each step of such method is disclosed.

Looking again to paragraph [0092] of Opfel, he states:

"...In addition, dry-heating animal bedding *in situ* may be accomplished with a flame, such as a portable , gas-powered (e.g. propane) burner or torch system. The flame may be under a hood or other **cover** as previously described for example. Heating the animal bedding with a flame may be carried out at a temperature of approximately 100° F to approximately 2,000° F for a time period of approximately 5-60 minutes." **Covers 22** of Figs. 2-4 are *in situ*. **Cover 23** of Fig. 5 using a **vacuum** under it is *in situ*. **Cover 26** of Fig. 6 (irradiation) is *in situ*. So how does the horse bedding under Opfel cover 22, such as straw, not burn up when subjected to a flame? And how does the flame move around inside the stationary cover 22 of Opfel, remembering that instant claim 17 recites **"moving the flamer over the surface while heating the poultry litter"**? Opfel's "method", the method being used in the Opfel/Jones §103 rejection, clearly does not teach that. And clearly it would not be obvious to drive the Jones tractor and row crop burner around inside of a poultry confinement building. How does the Jones burner

move around inside of the hood 22 of Opfel when there appears to be no access to the underside of hood 22 and at times is totally sealed?

Note that when Opfel in paragraph [0092] says “The flame may be under a hood or other **cover** as previously described for example,” **Opfel does NOT SAY that the flame is MOVING under the hood.** There is no teaching or motivation to move the flame under the hood of Opfel, so the proposed combination of Opfel and Jones does not provide a *prima facie* case of obviousness under 35 U.S.C. §103.

Furthermore, everything in paragraph [0092] of Opfel refers to “animal bedding” and nowhere in that paragraph does it talk about poultry litter. Obviously chickens and turkeys are birds, not “animals”. Chickens and turkeys do not “bed” on the floor. Chickens and turkeys “roost” if given a choice. Some poultry are in individual cages in poultry houses, so their litter passes through a metal mesh floor of cages to the floor of such building. In fact “bedding” is not used for poultry like straw, sawdust or the like is used for horse bedding.

Most of the time modern day poultry houses have dirt floors that are from time to time “de-caked” by harrowing or a scraper or rake. After several runs of birds they may remove the litter and dry it and use it for fertilizer. Chickens and turkeys typically just make their “litter” on a bare dirt floor and that litter on a floor is what is being sterilized in the present invention. That is another reason that for the most part “bedding” as referred to by Opfel does not even apply to anything placed on the floor of poultry in confinement. Opfel wants to recycle “bedding”. There is no reason to recycle “litter” formed by chickens or turkeys defecating on a floor that has no bedding on it. Such poultry litter would be just scooped up and removed, but not recycled, as contemplated by Opfel.

No *prima facie* case of obviousness has been presented. Additionally, the proposed combination of Opfel and Jones would not have been obvious to one of ordinary skill in this art to make such proposed combination.

The aforementioned arguments are clearly consistent with the procedure for determining whether a claimed combination is “obvious” under 35 U.S.C. §103 by the U. S. Supreme Court Decision in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. , 127 S. Ct. 1727, 1742, 167 L. Ed. 2d 705 (2007).

Accordingly, since it is clear that remaining claims 17, 19 and 22 are now allowable, a notice to that effect is earnestly solicited.

Respectfully submitted,
Ralph M. Pivonka

December 4, 2007

By: /Michael O. Sturm/
Michael O. Sturm
Reg. No. 26,078

STURM & FIX LLP
206 Sixth Avenue, Suite 1213
Des Moines, Iowa 50309-4076
Phone: 515-288-9589
Fax: 515-288-4860
e-mail: sturm@hsllp.com